FILED

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 170

MICHAEL ZAFFARANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals
for the Ninth Circuit

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Comes now the petitioner above named through his counsel and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on April 6, 1964. A timely petition for a rehearing was denied May 11, 1964.

OPINIONS BELOW

The opinion of the District Court for the Northern District of California, Southern Division (Honorable Oliver Carter, Judge) was not reported but appears in the form of a narrative which has been transcribed and constitutes a portion of the record on appeal. The opinion of the Court of Appeals for the Ninth Circuit is reported at 330 F. 2d 114. An earlier decision in the same case by the United States Court of Appeals appears in 306 F. 2d 707 (*Zaffarano v. United States*).

JURISDICTION

The opinion and judgment of the Court of Appeals for the Ninth Circuit were made and entered on April 6, 1964 and copies thereof are appended to this petition The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and under mandate of Rule 19, of the Supreme Court Rules.

QUESTIONS PRESENTED

This is a case involving the rules of criminal procedure affecting the voluntariness to plead guilty and the procedures to withdraw this plea of guilty any time prior to the imposition of sentence.

Question 1. Where the United States Court of Appeals has ordered the setting aside of a sentence and a hearing on the motion to withdraw a plea of

guilty, does the trial Court then have the right to deny the motion in the light of the specific language of Rule 32D, namely:

> "A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice a court after sentence may set aside the judgment of conviction *and permit* the defendant to withdraw his plea." (Emphasis added.)

2. Where the defendant was orginally denied the right of allocation (Title 18, Rule 32(a)) and where the Court did not originally inquire into the voluntariness of the plea of guilt (Title 18 U.S.C. Rule 11) and when it was necessary for the defendant, petitioner herein, to institute proceedings under Title 18 U.S.C. Section 2255 and then to proceed on appeal to the United States Court of Appeals on two separate occasions merely to obtain the right to stand trial for the charges, and where in the face of all this, the record shows by uncontradicted evidence that the plea of guilt was induced as a result of a "bargain and sale" transaction between the attorneys for the parties, is it not an abuse of discretion and a violation of the sanctity of the proceedings to deny the motion to withdraw his plea of guilt.

3. It is a basic constitutional right—the right of trial by jury—to deny a defendant in a criminal trial merely because the judge in this case presumed that prejudice resulted from the years of litigation necessary to protect the rights of the petitioner and

especially where no showing of prejudice had been made by affidavit or by evidence. In other words, is it a ground for denial of trial by jury that the government might be prejudiced since a long period of time elapsed between the alleged crime and the trial and especially when during the bulk of this period of time, the petitioner was in the United States Prison.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

This case deals primarily with the meaning and procedures of the following rules of criminal procedure as set forth in Title 18 of the United States Code, namely, Rule 11, Rule 32, paragraph (a) and paragraph (d).

STATEMENT OF THE ISSUES AND THE FACTS

The petitioner herein was arrested in San Francisco in the Spring of 1959 for an alleged violation of 18 U.S.C. Section 2314. This arrest was made without warrant and a subsequent search of the premises where he was residing allegedly turned up evidence of the stolen securities. At the first hearing (except for routine arraignment) and at the outset of the hearing, it was announced by the United States Attorney that the defendant wished to plead guilty to one charge of the indictment. The ultimate hearing indicated that there had been discussions between the

United States Attorney and privately retained counsel for defendant and this fact plus the knowledge that the United States Attorney had at the outset of the proceedings plus the plea which he made to the sentencing judge that leniency be shown lends credence to the claim of petitioner that he was induced to plead guilty by a promise of leniency which promise was not kept. Moreover, it is uncontradicted evidence that he was misadvised by his attorneys as to the maximum sentence that could be imposed under the indictment. Without inquiring as to the voluntariness of the plea, the judge accepted the plea and then without allowing the defendant a right of allocution, sentenced him to the maximum sentence which could be made under the indictment, namely, ten years in prison.

Some time later (and the defendant logically explains this delay by pointing to proceedings in State Courts that required his full time and attention), a petition for release was filed under 18 U.S.C. 2255 and this petition was granted to the extent that the sentence heretofore imposed was set aside. The defendant was denied an opportunity to support the charges that he had made that the plea was induced by promises and other forms of coercion. On the date when he made these charges, he himself was unrepresented but there were present in the Court as witnesses called by the Court the United States Attorney and the privately retained counsel and neither of these officers of the Court so much as whispered a denial of the truth of these charges then and there

made. Ultimately, the United States Court of Appeals reversed the sentence and sent the matter back for a hearing on the motion to withdraw the plea of guilt which hearing was held before the Honorable Judge Carter. His decision to deny the motion was based on the question of delay and laches and upon the fact that the defendant had not "sustained the burden of proof". This contention was upheld by the United States Court of Appeals in the decision for which certiorari is now sought.

The Court's reasons and reasoning is scrupulously set forth in his oral remarks appearing in the Reporter's Transcript of the proceedings and the Court has indicated that he desires these remarks to be treated as "findings of fact and conclusions of law" unless formal findings were prepared by the United States Attorney. No such formal findings were prepared so the Court's views as to reasons and to basis for discretionary acts are ascertainable.

It is clear that the Court treated this motion as one made after judgment had been imposed although it was a motion made before judgment. It was clear that the defendant's constitutional and statutory rights had consistently been violated and negated throughout these whole proceedings. It appears that as a matter of law, there is no question that the plea of guilt was induced by the Court and counsel. How much more evidence need be produced to "satisfy the burden of proof" is hard to tell considering the public interest in guaranteeing the right to trial by jury and preserving the sanctity of the Courts.

REASONS FOR GRANTING WRIT OF CERTIORARI

Certiorari should be granted in this case because an important Federal question, namely, the meaning and procedures under the rules of criminal procedure and the sanctity of the Federal Courts in allowing a plea that is not the will of the defendant to stand, has been decided by a Court other than the United States Supreme Court.

The writ should also be granted because the United States Court of Appeals allowed it to stand. A decision of the lower Court which negates the meaning and import of Rule 32 (D) of Title 18 of the United States Code in that it allows a trial Court to throw the burden of proof upon a defendant who merely wants to stand trial on the charges and it uses as a basis for denying a defendant the right to a trial the fact that delay over which the defendant had no control and which was not his fault may have "prejudice" to the government, although no such showing appeared in the record.

The importance of the procedures involved in the application of the Federal rules in criminal procedures has been shown by a series of recent cases in this Court dealing with the sanctity of the sentencing procedure and the interest of the judiciary in protecting the integrity of the judicial system. Reference is made to cases such as *Barzone v. U.S.*, 11 L.Ed. 2d page 11, *Saunders v. U.S.*, 10 L.Ed 2d, page 148; *U.S. v. Behrens*, 11 L.Ed. 2d 224. It will be noticed that all three of these cases have been decided within the last twelve months. Apparently, the

trial Court and the United States Court of Appeals are not prepared to accept the sanctity of the sentencing procedure and to protect the integrity of the government.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
June 8, 1964.

VINCENT HALLINAN,
CARL B. SHAPIRO,
PATRICK SARSFIELD HALLINAN,
By CARL B. SHAPIRO,
Attorneys for Petitioner.

(Appendix Follows)

Appendix

United States Court of Appeals
for the Ninth Circuit

Michael Zaffarano, Appellant, vs. United States of America, Appellee.	No. 18,669

[April 6, 1964]

Appeal from the United States District Court
for the Northern District of California
Southern Division

Before: Hamley, Hamlin and Koelsch, Circuit Judges.

Koelsch, Circuit Judge.

On this appeal, the sole issue raised is the validity of an order of the District Court denying defendant's motion to withdraw his previously entered plea of guilty to an indictment charging him with transporting stolen securities in interstate commerce in violation of 18 U.S.C. § 2314. The case is before us for a second time. On the earlier appeal, [*Zaffarano v. United States*, 306 F.2d 707 (9th Cir. 1962)] we held that the defendant was entitled to a hearing, pursuant

to Rule 32(d) F.R. Crim. P., on his motion. We reversed the judgment and remanded the case to the District Court, with instructions to hold a hearing on defendant's motion, to reimpose sentence if the motion was denied or, in the alternative, to grant a new trial if the motion was granted.

Briefly restating and supplementing the facts, which appear at length in the opinion on the prior appeal, [*Zaffarano v. United States, supra*, 306 F.2d 707 (9th Cir. 1962)] it is seen that a three-count indictment was returned against Zaffarano and two others. Zaffarano, represented by counsel of his own choosing; entered a plea of guilty to Count I. Counts II and III were dismissed. Zaffarano was then sentenced to a term of ten years and committed to the custody of the Attorney General. After he had begun serving his sentence, pending state criminal charges in New York and California, both of which arose out of the same transaction alleged in the federal indictment, were respectively dismissed in California and concluded by a suspended sentence in New York. It was not until two and one-half years after his original sentencing, and after the disposal of the pending state criminal actions that the defendant moved to withdraw his plea of guilty, the denial of which is the subject of this and his prior appeal.

In present posture it appears that defendant's case has been fully presented to the District Court on remand: that a hearing was duly conducted: that defendant's points in support of his motion to withdraw his plea of guilty were fairly considered but decided

adverse to him, and that sentence was reimposed with credit given for time served. Defendant is now at liberty on bail, pending the outcome of this appeal.

Defendant's several contentions, some of which are inter-related and identical, will be treated by us under two headings sufficiently broad to answer all points raised.

He first contends that his plea of guilty was not freely and voluntarily made as a matter of law. He asserts his plea of guilty was secured by a promise of leniency made to him by the United States Attorney. This contention is utterly devoid of merit. In substance it is nothing but a reiteration of the arguments and assertions unsuccessfully urged on the District Court; moreover, defendant does not refer to any evidence in the record that in any way tends to show the findings of the court below lack support. Though the evidence was conflicting on this issue, there was substantial evidence to support the trial court's finding. *Rosewig v. United States*, 144 F.2d 30, 33-34 (9th Cir. 1944) *Cert. Din.* 323 U.S. 764. While it is true that leave to withdraw a guilty plea prior to sentencing should be freely allowed, [*Poole v. United States*, 250 F.2d 369, 400 (D.C. Cir. 1957); *Kadwell v. United States*, 315 F.2d 667, 670 (9th Cir. 1963)] the trial court has a wide discretion in passing on such a motion and the reviewing court will not disturb the trial court's ruling in the absence of an abuse of that discretion. [*Vasquez v. United States*, 279 F.2d 34, 37 (9th Cir. 1960)] particularly when, as here, the defendant did not allege his innocence of the offense

charged. *United States v. Norstrand*, 168 F.2d 481, 482 (2d Cir. 1948).

Defendant's final contention is that the District Court did not accord him the consideration on the hearing to which a defendant is entitled under Rule 32(d), because of the fact that his motion came long after a sentence (which had been set aside) was imposed upon him. He asserts the earlier sentence colored and controlled the disposition made by the trial judge on remand.

Again, defendant fails to meet his burden. It was proper, and we so hold, for the trial court in evaluating the defendant's testimony to consider both his delay in asserting the claim and the intervening events that took place, in addition to the fact that he was represented by competent counsel at the time the guilty plea was entered. *Cf. United States v. Harris*, 160 F.2d 507 (2d Cir. 1947). Finding no abuse of discretion, we affirm the judgment.

United States Court of Appeals
for the Ninth Circuit

Michael Zaffarano,	Appellant,	No. 18,669
vs.		
United States of America,	Appellee.	

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

The Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 6, 1964.